EXECUTIVE SECRETARIAT

ROUTING SLIP

TO:

		ACTION	INFO	DATE	INITIAL
1	DCI		X		
2	DDCI		X		
3	EXDIR		X		
4	D/ICS				
5	DDI		X		
6	DDA				
7	DDO		X		
8	DDS&T				
9	Chm/NIC				
10	GC		X		
11	IG				
12	Compt				
13	D/Pers				
14	D/OLL				
15	D/PAO				
16	SA/IA				
17	AO/DCI				
18	C/IPD/OIS				
19	NIO /LA		X		
20	C/LA/DO		X		
21	D/ALA/DI		X		
22					

SUSPENSE ____________ Date

Remarks

Not referred to DOC. Waiver applies.

25X1

Not referred to USTR. Waiver applies.

Executive Secretary

5 Mar 85

Date

3637 (10-81)

Sanitized Copy Approved for Release 2010/07/23 : CIA-RDP87M00539R001802760035-7

SECRET

THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON
20506

Executive Registry
85- 936

March 5, 1985

ON FILE USTR RELEASE INSTRUCTIONS APPLY

Not referred to DOC. Waiver applies.

MEMORANDUM

TO: THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF DEFENSE
THE DIRECTOR OF CENTRAL INTELLIGENCE

FROM: WILLIAM E. BROCK

SUBJECT: Legal Authority for Trade Sanctions Against Nicaragua

At the request of Bob McFarlane, I had my staff review the President's legal authority to impose trade sanctions against Nicaragua under the International Emergency Economic Powers Act (IEEPA), section 232 of the Trade Expansion Act of 1962, or federal health inspection statutes. Two options were reviewed: (1) a total embargo on all imports from Nicaragua or (2) selective embargoes on imports from Nicaragua such as bananas, beef, and shellfish. I believe that the President's authority under IEEPA to impose a selective import embargo against Nicaragua is so clear as to be free from doubt. I believe that section 232 of the Trade Expansion Act of 1962 and section 406 of the Trade Act of 1974 are inappropriate for the trade sanctions contemplated here. Finally, I believe that the use of federal health inspection authority to indirectly embargo imports of Nicaraguan bananas, shellfish, and beef is likely to invite legal challenges and may involve a significant element of legal risk.

Section 203 of the International Emergency Economic Powers Act, 50 U.S.C. 1702, provides the President with the appropriate legal authority for a total or selective import embargo. IEEPA gives the President broad and plenary authority to proclaim a total or limited embargo of Nicaragua, including an embargo on the importation of selected Nicaraguan goods into the United States. Presidents traditionally have invoked IEEPA, or its predecessor, section 5 of the Trading with the Enemy Act, to embargo import and/or export trade with hostile powers during times of war or national emergency.

In contrast, while section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) authorizes restrictions on imports which "threaten to impair the national security," the intent of this provision was to prevent imports from injuring vital defense-

CLASSIFIED BY Claud Gingrich
DECLASSIFIED ON OADR

SECRET

C387

related industries, rather than to impose trade sanctions. Section 232 has been used only once, to proclaim global quotas on oil imports during 1959. It is therefore wholly unclear whether section 232 would cover imports of non-essential Nicaraguan foodstuffs. Finally, section 232 may be too cumbersome for the type of trade sanctions contemplated here, since it requires a fact-finding investigation and report by the Secretary of Commerce prior to any action by the President.

The use of federal health inspection authority to exclude Nicaraguan foodstuffs could be a risky legal proposition, since absent a public health basis for exclusion, a court potentially could strike down the embargo as "arbitrary and capricious." If we decide to go this route, we should bring in an expert in this area of the law to assess the risks involved.

I enclose a copy of a legal memorandum prepared by my General Counsel.

SECRET

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

March 3, 1985

MEMORANDUM

TO: AMBASSADOR BROCK

FROM: Claud Gingrich
General Counsel

SUBJECT: Legal Authority for Trade Sanctions Against Nicaragua

As per your request, I have reviewed the President's legal authority to impose trade sanctions against Nicaragua under the International Emergency Powers Act, section 232 of the Trade Expansion Act of 1962, or the federal health inspection statutes. Two options were reviewed: (1) an embargo on all imports of Nicaraguan goods and (2) limited embargoes on imports from Nicaragua such as bananas, shellfish, and beef under federal health inspection authority.

I believe that section 203 of the International Emergency Economic Powers Act (IEEPA) provides the President with the appropriate legal authority to proclaim a total or selective embargo on imports of Nicaraguan goods. IEEPA was expressly designed to provide the President with emergency authority to restrict trade with other nations during times of war or national emergency.

In contrast, section 232 of the Trade Expansion Act of 1962 was intended to protect the defense mobilization base of the United States from being weakened by excessive import competition. Congress wanted to protect vital defense-related industries to ensure that the United States would have the production capacity to fight a war. Accordingly, it is wholly unclear whether section 232 would cover restrictions on imports of small quantities of non-essential Nicaraguan foodstuffs.

While I am not an expert in the area of federal health inspection law, I believe that the imposition of restrictions on Nicaraguan foodstuffs under federal health inspection authority is a somewhat risky legal proposition. Absent some valid public health concern, we run the risk that a court will strike down any restrictions as "arbitrary and capricious."

SECRET

Discussion

I turn now to a more detailed discussion of the various authorities available to the President.

1. Section 203 of IEEPA

You have asked whether the President's authority under IEEPA would encompass a non-MFN embargo directed exclusively at imports from Nicaragua. Section 203(a)(1)(B) of IEEPA gives the President emergency authority to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, . . . importation or exportation of . . . any property in which any foreign country or a national thereof has any interest. 50 U.S.C. 1702(a)(1)(B) (emphasis added). This language gives the President plenary authority to defend the interests of the United States in times of national emergency. Section 203 of IEEPA was drawn almost word for word from section 5 of the Trading with the Enemy Act. Section 5 was a broad emergency power, one invoked by President Truman during the Korean war to embargo trade with hostile Communist nations.

In my judgment, the President's legal authority to proclaim a selective embargo against certain Nicaraguan products is so clear as to be free from doubt. With the phrase "any property," Congress explicitly indicated that the President could embargo on all imports or proclaim selective embargoes on specific products, such as bananas, beef, and shellfish. I note that, after the lapse of the Export Administration Act, the President relied on his IEEPA authority to maintain selective export controls on certain defense-related technologies.

To invoke IEEPA, the President must determine that there is an "unusual and extraordinary threat" to the "national security, foreign policy, or economy of the United States" (50 U.S.C. 1701(a)) and proclaim a "national emergency" under section 201 of the National Emergencies Act (50 U.S.C. 1621(a)). Under IEEPA, the President could determine that Nicaragua poses a threat to vital U.S. national security and foreign policy interests in Central America and that the United States must act to restrict Nicaragua's access to foreign exchange. This type of determination is virtually immune from any meaningful scrutiny in the courts. The courts give substantial deference to the President's authority in the area of foreign affairs, United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936), and this deference increases when Congress has granted broad emergency powers to the President, Dames & Moore v. Regan, 453 U.S.654 (1981). Although the National Emergencies Act originally authorized Congress to override the President's decision through a joint resolution, the Supreme Court struck down the legislative veto in Immigration and Naturalization Service v. Chadha, 51 U.S.L.W. 4907 (June 21, 1983). Hence, Congress cannot override the President's trade sanctions.

2. Other Authority for Trade Sanctions

I understand that it has been suggested that the President could also impose trade sanctions under section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) or section 406 of the Trade Act of 1974 (19 U.S.C. 2436). I believe, however, that use of section 232 and section 406 would be inappropriate in the situation presented here.

Section 232 authorizes the President to restrict imports which "threaten to impair the national security." The purpose of section 232 was to prevent imports from vital defense-related industries. 1955 U.S. Cong. & Adm. News, p. 2103 (1955). Accordingly, section 232(c) directs the President to consider a variety of factors, including the defense mobilization requirements of the United States and the impact of excessive imports on domestic production. Section 232 has been used only once -- to impose global quotas on imported oil in 1959.

It is wholly unclear whether section 232 would reach the Nicaraguan situation. Since the levels of imports from Nicaragua are small and the bulk of these imports consist of non-essential foodstuffs, it is difficult to see how these imports pose a threat to our wartime mobilization capacity. I realize that one could argue that the foreign exchange earnings derived from such imports pose an indirect threat to our national security, but this would represent a new, untested, and potentially controversial interpretation of section 232.

Section 232 may also be too unwieldy and time-consuming for the type of trade sanctions contemplated here. Because Congress assumed that section 232 would focus on the impact of imports on a U.S. industry, the statute requires a fact-finding investigation by the Commerce Department as a prerequisite to action by the President. The Commerce Department must conduct an investigation, hold public hearings if appropriate, and deliver a report to the President. The President can then limit or adjust the quantities of imports entering the U.S.

Section 406 is equally inappropriate. This provision authorizes the President to apply import restrictions if the U.S. International Trade Commission (ITC) determines that imports from a "Communist country" have resulted in "market disruption" in the U.S. Accordingly, the ITC must complete an investigation and issue an affirmative finding before the President can act. Absent an affirmative finding by the ITC, the President has no authority to restrict imports. Since our imports of Nicaraguan bananas, shellfish, and beef are quite small, it is highly unlikely that the ITC would find that imports from Nicaragua have resulted in market disruption in this country.

3. Selective Restrictions on Imported Foodstuffs

You have also asked whether the President could restrict the importation of Nicaraguan bananas, shellfish, and beef through application of federal health standards.

While I am not an expert in this area of the law, I believe that this option is a somewhat risky legal proposition. If we choose to pursue this approach, we should bring in an expert to evaluate the legal risks involved.

Section 801 of the Food, Drug, and Cosmetic Act (21 U.S.C. 381) directs the Secretary of Treasury to exclude imported foodstuffs whenever the Secretary of Health and Human Services determines that the food was packed in unsanitary conditions, is adulterated, or misbranded. Under this authority, the Food and Drug Administration (FDA) selectively samples shipments of imported food at ports of entry for sanitation, pesticides, bacteria, etc. This authority could be used to detain and exclude shipments of Nicaraguan bananas, shellfish, and beef.

Beef imports are subject to additional, independent regulation by the Department of Agriculture (USDA). USDA prohibits the importation of beef from certain countries because of rinderpest or foot-and-mouth disease (19 U.S.C. 1306; 9 CFR 94.2). In addition, under the Federal Meat Inspection Act (21 U.S.C. 601 et seq), USDA certifies meat inspection standards in foreign countries and maintains lists of countries and firms ineligible to export beef to the U.S. See 9 C.F.R. 327.2 et seq.).

As a general proposition, the courts have been extremely reluctant to overrule decisions by the FDA or USDA to bar the imported foodstuffs for public health reasons. See Ganadera Industrial S.A. v. Block, 727 F.2d 1156 (D.C. Cir. 1984); Sugarman v. Forbragd, 405 F.2d 1189 (9th Cir. 1969), cert. denied 394 U.S. 1012 (1969). Such decisions normally receive minimal judicial scrutiny under the "arbitrary and capricious" standard. Ganadera Industrial S.A. v. Block, supra at 1160.

The use of federal inspection standards to deny entry to imports from Nicaragua, however, will invite legal challenges in the U.S. courts by importers or purchasers of Nicaraguan goods. Even given the minimal level of judicial review available, a sympathetic court might strike down the inspector's decision if the court concludes that the health ruling was a mere pretext for political action against Nicaragua. To be on safe ground, we would need a valid health and safety rationale for denying entry.

We could also try to slow the entry of Nicaraguan goods through intensifed sampling of Nicaraguan products by the FDA, USDA, or the Customs Service. The FDA currently samples imported foodstuffs on a selective basis, while Customs Service currently inspects approximately 10 percent of all imported products (19 U.S.C. 1499). While these percentages could be increased, the Customs Service would probably face a barrage of lawsuits as the word leaks out.

4. International Legal Consequences

Given the prior litigiousness of the Nicaraguans, I note that Nicaragua could try to embarrass us by challenging the imposition of trade sanctions in the International Court of Justice under Article XXIV of our FCN treaty (T.I.A.S. 4024), although the treaty expressly excepts matters which a party deems "necessary to protect its "essential security interests." In addition, the Nicaraguans could try to challenge any sanctions under Article XXIII of the GATT, as they did in 1983 after we reduced their sugar quota.

Conclusion

In sum, I believe that the President's authority under IEEPA to impose a selective import embargo against Nicaragua is so clear as to be free from doubt. I believe that section 232 of the Trade Expansion Act of 1962 and section 406 of the Trade Act of 1974 are inappropriate for the trade sanctions contemplated here. Finally, I believe that the use of federal health inspection authority to indirectly embargo imports of Nicaraguan bananas, shellfish, and beef is likely to invite legal challenges and may involve a significant element of legal risk.